

Delaware Administrative Law Review Task Force

January 26, 2018

9:30 a.m.

Morris, Nichols, Arsht & Tunnell LLP - 1201 N. Market St. Wilmington, DE 19801

MEETING MINUTES

Task Force Members Present: T. McGonigle, R. Forsten, Justice Seitz, D. Gibbs, M. Houghton, A. Goldstein, M. Dunkle, Professor K. Kristl (telephone), D. Mangler and D. Atkins.

Task Force Members Absent: State Senator B. Townsend, Representative J. L. Mitchell, and J. Adkins.

Public Present: Dmitry Pilipis, John Whitelaw, Nathan Barnett, and Frederick Mitsdarfer.

Call to Order

Thomas McGonigle called the meeting of the Delaware Administrative Law Review Task Force to order at 9:37 A.M.

I. Approval of Minutes from January 5, 2018 Meeting:

Motion to approve minutes made by M. Houghton, seconded by M. Dunkle, and approved 9-0.

T. McGonigle provided a brief recap of the January 5, 2018 Task Force meeting and discussed the agenda for the meeting. T. McGonigle suggested that the review of the draft APA Legislation should continue from the progress the Task Force made at the January 5, 2018 Task Force meeting. T. McGonigle indicated once that is complete all the revisions the Task Force discussed would be incorporated into the draft APA Legislation, so that the Task Force could review and discuss those changes during the next and likely final Task Force meeting before the draft APA Legislation is provided to the Governor and General Assembly. T. McGonigle also suggested that the Task Force draft a transmittal document to the Governor and General Assembly, explaining what the Task Force has done and attaching a copy of the Joint Study of the Delaware Courts Report on Administrative Law.

II. Subcommittee on Land Use and Real Property – Review Status:

R. Forsten reported that the subcommittee plans to meet before the next Task Force meeting so that the subcommittee can finalize their recommendations for modest but impactful changes to the Landlord-Tenant Code, and the creation of a uniform appeal process throughout the counties and municipalities. R. Forsten stated the subcommittee will draft proposed legislation amending the Landlord-Tenant Code, Title 9, and Title 22 based on the subcommittee's recommendations, and the proposed legislation will be provided to the Task Force for consideration in advance of the next Task Force meeting.

M. Houghton suggested that once the subcommittee has drafted proposed legislation, it should meet with representatives from the counties and municipalities. M. Dunkle

mentioned that a representative from Sussex County is member of the subcommittee. T. McGonigle stated that representatives from New Castle County had previously reached out and the subcommittee should discuss the proposed legislation with representatives from the all three counties.

T. McGonigle suggested that once the subcommittee has finished drafting its proposed legislation it should be combined with the APA legislation into a single proposed senate bill.

III. State Regulatory Subcommittee – Review Status:

D. Gibbs reported that the subcommittee was making progress with the budget office and should have information before the next Task Force meeting. T. McGonigle mentioned that it was important to know the budget implication of the draft APA legislation before the Task Force decided which Agencies are included in the Administrative Law Judge process created under the draft APA Legislation.

IV. Draft APA Legislation- Review Comments:

T. McGonigle reminded the Task Force that he had received comments from Task Force members on the draft APA Legislation, and that the comments were categorized into one document for review, consideration, and hopefully resolution. The Task Force agreed to continue to work through the document by comment in an effort to reach a resolution on each point raised from the progress made during the January 5, 2018 Task Force meeting.

The Task Force discussed comments relating to Section 10141 of the draft APA Legislation regarding the difference from the existing APA standard of review and concerns regarding the possibility of technical violations. Justice Seitz suggested that the concerns relating to the proposed revisions to the standard of review could be addressed by reintroducing a requirement of prejudice. The Task Force expressed agreement with Justice Seitz, stating that prejudice should be decided by the Courts. The Task Force agreed that the standard of review will be revised to include a requirement of prejudice similar to the current standard.

The Task Force discussed comments relating to Section 10142 of the draft APA Legislation regarding the potential impact the revised judicial standard might have the State's ability to rely on the expertise of the board and agency professionals. T. McGonigle reminded the Task Force that the proposed language in this section were the product of extensive debate and compromise. M. Dunkle explained that the proposed language reflects an effort to balance the deference between the State and the other party. The Task Force agreed that language should be added to Section 10125(b) explicitly stating that the State is able to continue to rely on the expertise of the board and agency professionals, which A. Goldstein would provide from controlling case law. The Task Force discussed comments relating to the judicial standard of review and the inclusion of "competent evidence". The Task Force agreed that the judicial review standard should be revised to explicitly include the reasonable person element of the substantial evidence standard.

The Task Force discussed comments relating to Section 10145 of the draft APA Legislation and agreed to amend the section to include a list of parties that must be named in an appeal.

The Task Force discussed comments relating to Section 10161 of the draft APA Legislation regarding potential inconsistencies with other proposed revisions and agreed to revise the section to resolve inconsistencies with other sections of the draft APA legislation.

The Task Force discussed comments relating to Section 10152 of the draft APA Legislation regarding how the Chief ALJ position should be structured. The Task Force discussed comments regarding the importance of the ALJ being merit exempt employees and whether the Chief ALJ should serve at the pleasure of the Governor or for a set period of time. The Task Force also discussed comments regarding need for some consistency and importance to structure position to avoid an entitlement issue. The Task Force agreed that the Chief ALJ should be appointed by the Governor, confirmed by the Senate, and serve for a four year term, with hold-over status, and should have experience managing legal staff.

The Task Force discussed comments relating to Section 10157 of the draft APA Legislation regarding how the Administrative Law Judge Screening Committee should be structured. The Task Force discussed comments regarding the potential issues relating to the Chief ALJ serving as a member of the screening committee. The Task Force agreed that the Chief ALJ should not be a member of the screening committee, but that the screening committee must consult with the Chief ALJ on nominating criteria for potential ALJ candidates.

The Task Force discussed comments relating to the need to reconcile the draft APA Legislation with any potentially conflicting or inconsistent statutes creating board subject to the APA, including the Environmental Appeals Board and the Coastal Zone Industrial Control Board. The Task Force agreed that the statutes of the agencies, boards, and commissions subject to the APA should be reviewed, and any conflicts or inconsistencies should be resolved as part of the proposed Senate bill. The Task Force also discussed comments relating to the need to decide which Licenses will require Formal Hearing and will be listed in Section 10131(e), and agreed to revisit this during the next Task Force meeting.

The Task Force agreed that a revised version of the draft APA Legislation would be created, incorporating the Task Force's discussions to date and the language to be provided by A. Goldstein, and circulated to the Task Force for further review and comment.

V. Schedule Upcoming Meetings:

Next task force meeting is tentatively scheduled for February 23, 2018 at 9:30 a.m. meeting in Wilmington. The meeting will be held at the offices of Saul Ewing.

VI. Public Comment:

None.

VII. Adjournment:

There being no further business, the meeting adjourned at 12:05 P.M.

 co-chair